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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARIO TRUJILLO, Defendant and Appellant.	H032260 (Monterey County Super. Ct. No. SS050513A)

Defendant Mario Trujillo was convicted after jury trial of first degree murder (Pen. Code, § 187; count 1),[1] shooting at an occupied vehicle (§ 246; count 2), and actively participating in a criminal street gang (§ 186.22, subd. (a); count 4). The jury further found true allegations that defendant personally discharged a firearm in the commission of the offense in count 1 (§ 12022.53), and that he committed the offenses in counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The trial court sentenced defendant to the indeterminate term of 65 years to life.

On appeal, defendant contends: (1) the principles of double jeopardy require dismissal of count 4; (2) the court erred in excluding evidence of third-party culpability; (3) the court erred in denying disclosure of the identity of a confidential informant;

[1] Further unspecified statutory references are to the Penal Code.

(4) the court abused its discretion in excluding expert testimony on eyewitness identifications; (5) the court erred in admitting evidence of information on defendant's pre-booking form; (6) the court erred in admitting evidence of defendant's possession of a firearm and of his jailhouse conversations; (6) trial counsel rendered ineffective assistance; and (7) cumulative error requires reversal. As we find no prejudicial error, either individually or cumulatively, we will affirm the judgment.

BACKGROUND

Defendant was charged by amended information with first degree murder (§ 187, subd. (a); count 1), shooting at an occupied motor vehicle (§ 246; count 2), obliterating the identification of a firearm (§ 12090; count 3), and actively participating in a criminal street gang (§ 186.22, subd. (a); count 4). The information further alleged that the offenses in counts 1 through 3 were committed for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(1)), and that defendant personally discharged a firearm during the commission of the offense in count 1 (§ 12022.53).

The trial court heard motions in limine on February 15, 2006, and testimony began on February 22, 2006. Prior to submission of the matter to the jury on March 6, 2006, the prosecutor withdrew count 4. On March 14, 2006, the jury informed the court that it found the defendant guilty of the offense in count 3, and it found the gang enhancement as to that offense to be true, but it could not reach a verdict as to the offenses in counts 1 and 2. The court accepted the verdict as to count 3 and declared a mistrial as to counts 1 and 2. On May 25, 2006, the court sentenced defendant to seven years in state prison on count 3.

Defendant appealed, contending in part that there was insufficient evidence to support the conviction on count 3. We agreed and reversed the judgment. (*People v. Trujillo* (Jan. 17, 2008, H030321) [nonpub. opn.].)

In the meantime, the trial court heard motions in limine for the retrial beginning on June 5, 2007. The court denied defendant's motion to exclude evidence of a nine-

millimeter handgun seized from defendant's bedroom on the night of his arrest, and evidence of taped jail telephone calls between defendant and his father and defendant and his brother. The court also denied defendant's motion to present expert testimony on eyewitness identifications, and his motion to present evidence of third-party culpability. After conducting an in camera hearing on June 11, 2007, the court denied defendant's request to disclose the identity of a confidential informant. The court granted the prosecutor's request to admit defendant's January 8, 2005 pre-booking form as an exhibit after defense counsel stated he had no objection.

Although defendant's counsel waived formal reading of the information to the jury venire, he did not object when the court informed the venire that defendant was being tried on three counts: "The first one is homicide; Count 1. The second one is shooting at a vehicle; that's count 2. And the third one is knowingly participating in a street gang with knowledge that the gang engaged in a pattern of criminal activity."

The Trial Evidence

On the night of August 27, 2004, Juan Raya helped his friends Jorge, Edgar, Jose, and Hugo[2] take a brake light off of a car Jorge had parked at his house on Pacific Avenue in order to put the light on Edgar's car. While they worked, Hugo's girlfriend Maria sat in the driver's seat of her car which was parked on the street behind Edgar's car. Hugo was wearing a blue plaid shirt, Jose was wearing a white T-shirt with small blue stripes, and Raya was wearing a blue T-shirt under a gray hooded sweatshirt.

As the men were removing the light from Jorge's car, a new Honda Accord with its windows halfway down passed by them very slowly. Somebody mentioned that the people in the car were staring at them. Hugo and Jose saw at least three people in the car,

[2] Some witnesses were identified throughout the trial by their first names only in order to protect their privacy. Hugo admitted having been convicted of felony vehicle theft in 2004.

but neither of them recognized anybody. Edgar and Jorge thought that the car and the people were the same ones they had seen at the apartment complex they had passed on Pacific Avenue as they drove from Edgar's house to Jorge's house that night.

The Honda turned the corner at Del Monte. Hugo got back into the passenger seat of Maria's car while Jorge and Edgar put the light on Edgar's car. Raya and Jose stood nearby. A man wearing a white hooded sweatshirt and dark pants walked up to Edgar's car from the corner of Del Monte and Pacific. As he passed by Jose and Raya, the man asked twice in English, " 'Are you guys gangsters?' " Jose responded, "We are just racers, bro." Edgar and Jorge also said that they were "just racers," and that they did not want any problems. Edgar recognized the man as somebody who had gone to his high school. Both Hugo and Maria watched what was happening and got a good look at the man's face. Raya approached the man but did not say anything. The man pulled out a revolver and pointed it at the back of Raya's head. Jorge yelled at the man to put the gun away. The man pulled the trigger, and the gun "clicked," but it did not fire. Jorge yelled at Raya to run, and Jorge ran towards Del Monte, but Raya did not move. The man pulled the trigger again, and this time the gun fired. Raya fell to the ground face down. The man turned and looked at Maria, pointed his gun at her, then turned and pointed the gun at Hugo and fired it. Hugo, Jose, Edgar, Jorge, and Maria all identified defendant at trial as the man who shot Raya and who also fired at Hugo while Hugo was in Maria's car.

Defendant turned back and looked down at Raya and at Jose. He then walked quickly down Pacific toward the apartment complex and in the opposite direction from Del Monte. Jose turned Raya over and told him that everything would be okay. He then ran after defendant. Edgar followed, but then yelled at Jose to stop because defendant still had the gun. Jose and Edgar returned to Raya. Edgar called 911 and Jose flagged down a passing police car.

Hugo ducked down when defendant fired at him and he told Maria to get them out of there. Maria backed the car up then sped up to Del Monte, turned right, and drove up to the next block, where she picked up Jorge. They all drove to Maria's mother's house and Maria's mother took them back to Jorge's. The police were at Jorge's when they returned. They told the officers that they had seen what happened. Officers separately took Hugo, Maria, Jorge, Jose and Edgar to the police station, where they separately described to officers what they had seen and heard. However, it was clear that some of the witnesses had talked to each other prior to the interviews, because they shared information during the interviews that they had learned from others.

Salinas Police Officer Arlene Currier was driving westbound on Del Monte near Pacific on the night of August 27, 2004, when two men flagged her down and told her that somebody had been shot. After she located Raya, who was still breathing, the officer secured the area and called for backup. She also broadcast the reported description of the shooter: an "Hispanic male adult, about 5'7", approximately, wearing a white hooded sweat shirt, and gray pants," who was last seen heading southbound on Pacific on foot. A few minutes later another officer broadcast a reported description of the shooter as an Hispanic male adult, " '21 or 22; 5'7"; 160; white hooded sweater with gray pants,' " carrying a " 'silver handgun with brown pistol whip.' " Jose reported to an officer that the suspect was between the ages of 20 and 22 years old, approximately five feet eight inches tall, weighing 170 pounds, having a medium complexion and a light mustache, and wearing a white sweater, but the officer did not broadcast that description because a similar description had already been broadcast.

Salinas Fire Department paramedics were dispatched to the area of Pacific and Del Monte at 12:03 a.m. on August 28, 2004. Officers directed the paramedics to Raya, who was lying on the sidewalk about 30 to 50 feet down Pacific Avenue. The paramedics pronounced Raya dead at 12:14 a.m. The cause of Raya's death was later determined to be a gunshot to the top of the back of his head. Although Raya had a tattoo that could be

considered gang related, it would have been covered by his clothing and not visible to the shooter at the time of his death. The parties stipulated that a chemical analysis of the blood samples taken from Raya during the autopsy indicated that Raya "took cocaine within several hours of his death" and that "the dose that [he] took was a recreational dose taken with alcohol."

Officers recovered bullet fragments but no casings at the scene. A bullet apparently hit the rack on a van and lodged in a residence. Other bullet fragments were recovered from Raya's skull during the autopsy. An officer determined that the bullets were probably hollow point and that they were fired from either a .38 special or a .357 magnum revolver. The fragments were not large enough to enter information on them into the Integrated Ballistics Identification System (I.B.I.S.). Officers saw a white hooded sweatshirt in the back of a pickup truck parked on Pacific away from the murder scene in the direction defendant fled after the shootings, but the sweatshirt was neither seized nor photographed.

The day after the shooting, Hugo, Jorge, Edgar and Jose got together at Edgar's house and talked about what had happened. Edgar told them that he recognized the shooter from his high school. Edgar went to that high school between 2001 and 2004. Defendant's pictures are in the 2000, 2001, and 2002 high school yearbooks, which can be found at the Salinas public library. Edgar later told the police that he found a high school yearbook, but that he did not find a picture of the shooter.

The parties stipulated that "on October 3rd, 2004, at 8:05 a.m., the defendant Mario Trujillo was treated at Natividad Medical Center for gunshot wounds, and was weighed by medical staff at that time; his weight at that time was 102.5 kilograms, which is equivalent of 225 and a half pounds, one kilogram for every 2.20 pounds."

In late December 2004 and early January 2005, officers separately showed Maria, Hugo, Edgar, Jose, and Jorge the same photographic lineup. Each of them identified defendant's picture.

Officers arrested defendant on January 8, 2005, and searched his home pursuant to a search warrant. At the time, defendant was 5'9" tall, and weighed 220 pounds, but he weighed 180 pounds on June 12, 2004. The officers found a loaded semi-automatic nine-millimeter pistol, a separate loaded nine-millimeter magazine, and a number of live hollow-point cartridges in a speaker box in defendant's bedroom. An officer later test-fired the pistol and determined that it did not match any cartridges that are in I.B.I.S. The officers also found red sweatshirts, red and white shirts, and a maroon San Francisco 49ers beanie cap in defendant's bedroom, and two 49ers sweatshirts in defendant's sister's bedroom. Defendant's sister told the officers that the one hooded sweatshirt in her room belonged to defendant. She also told the officers that, beginning the previous year, she suspected that defendant's friends were Norteño gang members, but that defendant never told her he was a gang member. Defendant referred to Sureño gang members as scraps and he wore red or burgundy beanies on his head. In a jailhouse telephone conversation with his father, defendant said that he got the gun found in his bedroom for protection after he was shot at.

Becky Diaz was with defendant when he was arrested on January 8, 2005. She testified that prior to the summer of 2004, she saw defendant at parties at the apartment complex on Pacific Avenue where she went "to hang out with" her friends. When she started dating defendant in June 2004, she stopped going to those parties. She does not remember whether or not she was with defendant on the night of August 28, 2004.

Salinas Police Officer Bryan McKinley testified that Norteño street gangs formed shortly after the Nuestra Familia prison gang. The gangs are very structured in prison, but are much more informal "[o]n the street." There are approximately 600 Norteño gang members in Salinas, and the various gangs claim specific neighborhoods. Norteño gang members associate with the color red. The Mexican Mafia and Sureño gang members are their rivals. Sureño gang members associate with the color blue. Norteños refer to Sureños as "scraps."

East Las Casitas (E.L.C.) is a Salinas Norteño street gang. The primary activities of Salinas Norteño street gangs are the continuing commission of crimes such as murder, attempted murder, robbery, burglary, intimidation of witnesses and victims, carjacking, and kidnapping. On March 8, 2004, Adam Delgado, a Norteño gang member who had been yelling Norteño gang slogans, shot a young man in Salinas he thought was a Sureño gang member. As a result, Delgado was convicted of attempted murder with the use of a gun and with a gang enhancement. On January 15, 2004, two juveniles who were Norteño gang members, Orlando G. and Steven L., attacked an individual on the street while yelling "Las Casitas." During the confrontation, another person came to the victim's help and was shot in the back of the head. That person died as a result of the gunshot. The juveniles were found to have committed assault with a deadly weapon with a gang enhancement, and were committed to the California Youth Authority. On September 2, 2002, Norteño gang member Mauro Lopez was with two other Norteño gang members when he fired a gunshot into an individual's vehicle. Lopez was subsequently convicted of assault with a firearm with a gang enhancement.

In Officer McKinley's opinion, defendant is an active Norteño gang member. In March 2002, defendant was present during a shootout between Norteño and Sureño gang members in Salinas. Norteño gang signs and letters from known Norteño gang members were found in his bedroom. He has been housed in the county jail with other active Norteño gang members, and has had Norteño gang member cellmates and visitors. Other known Norteño gang members have provided money for defendant's jail account. In addition, defendant was identified as a member of E.L.C. on a "kite" roster of gang members seized at the county jail. His former jail cellmate identified him in a taped jail telephone conversation as a member of E.L.C. in 2006. On April 23, 2007, defendant and another Norteño gang member were involved in an incident where a Norteño gang dropout was attacked at the jail.

Also, in Officer McKinley's opinion, if a Norteño gang member were to be involved in a shooting incident like the one at issue here, the crime would be committed for the benefit of a Norteño criminal street gang. The crime is a very violent crime and is the type of crime that members of the community fear will happen in their community. It also causes fear of retaliation as well as respect for the gang and the individual involved.

On June 22, 2001, Jorge was the victim of a battery by two unknown Norteño gang members who had challenged him to a fight when he was wearing a blue belt. On March 17, 2004, Jorge was the victim of a battery on school grounds by several Norteño gang members after they asked him if he was "a scrap." On June 12, 2004, when defendant was arrested on unrelated charges, he told jail personnel that he had no enemies in the jail and that he would be comfortable housed in the general population. Defendant told the jail personnel the same thing when he was arrested on January 9, 2005. On September 28, 2005, when Edgar was arrested on unrelated charges, he was wearing a blue shirt and he informed jail personnel that he was associated with a gang, that he had Norteño enemies housed in the jail, and that he wanted to be housed in administrative segregation.

Verdicts, Motion for New Trial, and Sentencing

On July 23, 2007, the jury found defendant guilty of first degree murder (§ 187; count 1), shooting at an occupied vehicle (§ 246; count 2), and actively participating in a criminal street gang (§ 186.22, subd. (a); count 4). The jury further found true the allegations that he personally discharged a firearm in the commission of count 1 (§ 12022.53), and that the offenses in counts 1 and 2 were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

On October 15, 2007, defendant filed a motion for new trial, arguing in part that the court erred in admitting over his objection tape recordings of several of his jail telephone calls, and that the evidence was insufficient to support the jury's finding that defendant was the person who shot Raya. The prosecutor filed opposition to the motion.

On October 25, 2007, the court denied the motion for new trial and sentenced defendant to the indeterminate term of 65 years to life.

DISCUSSION

Double Jeopardy

Defendant first contends that the conviction on count 4 must be reversed and the charge dismissed because double jeopardy principles forbade retrial on that count. "[J]eopardy attached when the first jury was impaneled. The prosecution withdrew count four at the end of trial without [defendant's] consent. There was not a showing of legal necessity. By contrast, legal necessity was shown for count one and two when the jury reached an impasse. A mistrial was declared for counts one and two but not for count four. While retrial on counts one and two was permitted, it was not permitted for count four." Defendant acknowledges that he never entered a plea of once in jeopardy to count 4, but contends that this court should address the issue "because otherwise trial counsel would be ineffective."

The Attorney General contends that defendant has waived his double jeopardy claim by failing to enter a plea of once in jeopardy prior to the commencement of the second trial. The Attorney General further contends that defense counsel may have made a reasonable tactical decision not to have defendant enter such a plea. "Counsel may well have wanted the second trial jury to have an option to the murder and shooting at an occupied vehicle charges, just as the first trial jury was able to select the alteration of firearm identification charge instead of the murder or shooting at occupied vehicle counts. The street terrorism charge is only a wobbler, suggesting lenient treatment of the offense. . . . The agreement between the parties was not outlined in detail in the record of the first trial. Since the prosecution did not dismiss count 4, it cannot be assumed that the decision not to present the count to the jury would necessarily preclude a retrial of that count. In light of the record in this case, [defendant] has failed to satisfy his burden of demonstrating incompetence" of trial counsel.

When a defendant does not enter a plea of once in jeopardy, the defendant's claim that a prosecution violated his constitutional and statutory rights against double jeopardy "is 'technically' not cognizable on appeal. [Citations.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1201.) If we could conceive of no legitimate tactical reason for counsel's failure to raise a defense of once in jeopardy, we would have to decide whether the claim of double jeopardy has merit. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1185; see also, *Scott*, *supra*, 15 Cal.4th at p. 1201.) However, if we can conceive of a reasonable tactical reason for counsel's failure to timely raise the issue, then, regardless of the validity of the claim, defendant has not demonstrated prejudicial error. (Cf. *People v. Marshall* (1996) 13 Cal.4th 799, 824, fn. 1; *Morales*, *supra*, at p. 1185.) "An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540; *People v. Avena* (1996) 13 Cal.4th 394, 421.)

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.] When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.] Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "If it is easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland*, *supra*, at p. 697.)

Here, the record supports a finding that trial counsel's actions were based on an informed tactical decision. Counsel at defendant's second trial was the same counsel who represented defendant at his first trial, so counsel was well aware that count 4 had not been submitted to the jury at the first trial. Counsel was also well aware that the jury at defendant's first trial found defendant guilty of the weapon offense that was submitted to them but was unable to determine whether defendant was also guilty of the murder and the shooting offense. However, counsel did not have defendant enter a plea of once in jeopardy as to count 4, nor did counsel object when the court informed the jury venire at the second trial that defendant was going to be tried on count 4. Defendant's defense at the second trial was that, although the shooting might have been gang related, defendant was not the actual shooter. Counsel presented evidence to the jury suggesting that the victims and eyewitnesses had a gang affiliation, that there was poor street lighting at the time of the shooting, that the eyewitnesses discussed together who the shooter might be before they picked defendant's photo out of the lineup, and that defendant did not have a prior history of violence. Counsel stressed this evidence during closing argument, and stressed the lack of evidence connecting defendant to a white hooded sweatshirt or to the weapon used in the shooting. Counsel argued that the evidence presented was insufficient to support a conviction on the murder and shooting counts, but counsel did not contest the sufficiency of the evidence to support the substantive gang count. In addition, counsel did not raise the double jeopardy issue in the motion for new trial. We agree with the Attorney General that the record on appeal supports a finding that counsel may have wanted the second trial jury to have the option to find defendant not guilty of the murder and shooting counts, but guilty of the substantive gang offense. Defendant has not carried his burden of demonstrating that incompetence of counsel warrants reversal of the conviction on count 4.

The Confidential Informant and Third-Party Culpability Evidence

As part of his motions in limine, defendant sought discovery of San Rafael Police Department reports regarding a specific January 2005 Marin County criminal case that defendant described, contending the evidence "is relevant and admissible both as impeachment of the prosecution witness Ruben Lopez, admissible evidence of bad character on the part of Ruben Lopez and as third party culpability evidence." Defendant contended that, according to information previously disclosed by the prosecution in this case, Lopez, an E.L.C. gang member, robbed a victim in San Rafael while armed with a chrome revolver, which he thereafter gave a friend in Salinas for safe keeping; Lopez admitted to a confidential informant (C.I.) that he was present at the shooting at issue here; Lopez matched the description the eyewitnesses gave of the shooter; and Lopez has blamed the shooting on defendant, his "fellow Norteño gang member."

At the hearing on the motion, the prosecutor stated that she did not intend to call Lopez as a witness, unless she needed him to be a rebuttal witness. The prosecutor further stated that, contrary to defendant's claim, "at no time does the C.I. indicate that Ruben Lopez ever said that he was present at the time of the shooting. He indicates that the first thing that happened was hearing about the shooting on the night that it occurred and it was very close to where Mr. Lopez had been, and that he just said that it had happened, and that it was a southerner who had gotten killed. And then it was later on that Ruben Lopez contacted the C.I. and said that it was Mario, 'The Homie, Mario,' who told him he had done the shooting. And he even gave specific words as to what it was that he said. And he went through this several times, and the C.I. was very consistent."

The court ruled that the Marin County case involved gang activity "motivated by robbery. So I don't think there's a sufficient similarity between the offenses in San Rafael and this offense, nor is there any direct evidence linking Ruben Lopez to this homicide. So, for the reasons that I've stated, the request to have [Lopez] identified as a third-party culpable person is denied."

The court later held an in camera hearing to determine whether it should disclose the identity of the confidential informant. The court summarized its findings after that hearing for defendant as follows: "Number one, the confidential informant was not a percipient witness to the shooting on Pacific Street without any question; number two, . . . based on what the confidential informant said, . . . Ruben Lopez never told the confidential informant that . . . Ruben Lopez was present at the time of the shooting. The information of the confidential inform[ant], if not all of the information that that person received[,] was from Ruben Lopez indicating that Mr. Trujillo was the person that had done the shooting."

The court, therefore, denied defendant's request to disclose the identity of the confidential informant and reaffirmed its ruling regarding the third-party culpability evidence. "Clearly, it is of utmost importance for the Courts to protect the identity of persons like this person [who] came forward and provided information. The information . . . gave rise to identifying Mr. Trujillo as the shooter, which subsequently gave rise to the assemblage . . . of the photographic lineups in question, and in which a number of witnesses identified Mr. Trujillo from those photographic lineups. [¶] In addition to that . . . ruling there's nothing that the informant testified to – as a matter of fact, the only information received during the hearing just further confirms my ruling regarding third party culpability as to Ruben Lopez. So I've previously denied that request to have Mr. Lopez testify in that regard, and that ruling remains as previously stated."

Defendant now contends that the denial of his discovery request and the exclusion of the evidence of possible third-party culpability violated his right to present a defense. "The court abused its discretion in excluding the third party culpability defense. Because [defendant] should have been permitted to present the defense, denial of discovery of material which would have led to admissible evidence was an abuse of discretion." Defendant also requests that the court review the transcript of the in camera hearing to

determine whether the trial court properly denied defendant's request for disclosure of the identity of the confidential informant.

"A defendant's motion to discover is addressed solely to the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand. [Citations.] Allowing an accused the right to discover is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. [Citations.]" (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535; see also *Holman v. Superior Court* (1981) 29 Cal.3d 480, 483.) "The right of discovery in criminal cases is, of course, not absolute. The court retains wide discretion to protect against disclosure of information that might unduly hamper the prosecution or violate some other legitimate governmental interest." (*People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1316; see also Evid. Code, § 1040.) " 'An accused is entitled to any " 'pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense. . . .' [Citation.]" [Citations.]' [Citation.]" (*Barrett*, *supra*, at p. 1318.) "Pretrial discovery is aimed at facilitating the swift administration of justice, not thwarting it." (*Holman*, *supra*, 29 Cal.3d at p. 485.)

"[T]he prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant. [Citation.] An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citation.] The defendant bears the burden of adducing ' " 'some evidence' " ' on this score. [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 159-160.)

"[T]hird party culpability evidence is admissible if it is 'capable of raising a reasonable doubt of [the] defendant's guilt,' . . ." (*People v. Robinson* (2005) 37 Cal.4th

592, 625.) "[W]e do not require that *any* evidence, however remote, must be admitted to show a third party's possible culpability." (*People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*), italics added.) [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt . . . ." (*Ibid.*) "[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325; see also *Hall*, *supra*, 41 Cal.3d at p. 833.)

Although a trial court's discretionary power to exclude evidence under Evidence Code section 352 "must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense" (*People v. Cunningham* (2001) 25 Cal.4th 926, 999), a discretionary ruling under Evidence Code section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; see also *People v. Lewis* (2001) 26 Cal.4th 334, 372-373; *People v. Robinson, supra,* 37 Cal.4th at p. 625.)

After reviewing the record before us, including the sealed transcript of the in camera hearing, we cannot say that the trial court abused its discretion in denying defendant's request for discovery of police reports underlying the Marin County prosecution of Ruben Lopez, or in denying disclosure of the identity of the confidential informant. Neither Lopez nor the confidential informant testified at defendant's trial, so their credibility is not an issue. There is no evidence that either Lopez or the confidential

informant was a percipient witness to the shooting at issue. Lopez told the confidential informant what he knew about the shooting, but neither of them claimed to have been present at the shooting. That Lopez was a member of the same gang that defendant was allegedly involved with, that Lopez robbed a victim with a gun in Marin County, and that he gave the gun to an associate in Salinas, is not evidence that would connect Lopez to the Salinas shooting. Nor could the evidence raise a reasonable doubt as to defendant's guilt. (*Hall, supra*, 41 Cal.3d at p. 833.) In addition, the limited probative value of the evidence was greatly outweighed by the possibility of its confusing the issues or misleading the jury. (Evid. Code, § 352.) Defendant has not shown that the court's denial of his discovery request, denial of his request to present third-party culpability evidence, and/or denial of disclosure of the identity of the confidential informant were an abuse of discretion or denied him his rights to prepare a defense and to a fair trial.

Expert Testimony

Defendant wanted to call Dr. Steven E. Clark, a psychologist, "to testify about the problems with photo lineups generally, the manner in which identifications are made, how memory works and how it fades over time, and factors that can affect the validity of an identification via photo lineup including contamination of memory by other sources." The trial court denied the request, finding that the witnesses corroborated each other, that there was no evidence that they talked about identifying defendant as the shooter before they separately picked his photograph out of the lineup, that the eyewitnesses are of the same ethnic background as defendant so there was no problem with cross-racial identification, that the jury instruction on eyewitness identifications "fairly well delineates for the jury the factors that they are to consider in looking or considering eyewitness testimony," and that it is a matter of common knowledge that memory fades over time.

Defendant now contends that the court abused its discretion in denying his request to present expert witness testimony on eyewitness identifications. "When, as here, the

only evidence corroborating the witnesses' identification [was] the identification of the other witnesses, exclusion of an identification expert is an abuse of discretion."

"Expert testimony on the psychological factors affecting eyewitness identification is often unnecessary." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 995.) " '[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion; . . . "we do not intend to 'open the gates' to a flood of expert evidence on the subject." [Citation.] We expect that such evidence will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter. Yet deference is not abdication. When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability . . . , it will ordinarily be error to exclude that testimony.' [Citation.]" (*People v. Jones* (2003) 30 Cal.4th 1084, 1111; see also *People v. McDonald* (1984) 37 Cal.3d 351, 377, overruled on another point in *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *People v. Sanders* (1995) 11 Cal.4th 475, 509.)

"Exclusion of expert testimony is justified only if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability." (*People v. Jones, supra,* 30 Cal.4th at p. 1112.) In *Jones,* the eyewitness identification of the defendant was corroborated by the testimony of five witnesses. All five witnesses could have been impeached by proof of bias or prior inconsistent statements, and three of the witnesses were accomplices whose testimony required corroboration to support a conviction (§ 1111). The court found that the cumulative corroborative effect of this testimony was sufficient corroboration to give independent reliability to the eyewitness identification. (*Jones, supra,* at p. 1112.)

In this case, we cannot say that the trial court abused its discretion in finding the proffered expert testimony unnecessary because the five eyewitnesses to the shooting substantially corroborated each other's identification of defendant as the shooter, which

gave each identification independent reliability. (*People v. Jones, supra,* 30 Cal.4th at p. 1112.) Even if we were to find that the court should have allowed the expert testimony, we cannot say that it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the erroneous exclusion. (See *People v. Sanders, supra,* 11 Cal.4th at p. 510; *People v. Watson* (1956) 46 Cal.2d 818, 836.) During the trial, defense counsel was able to cross-examine the eyewitnesses and present other testimony regarding the adequacy or inadequacy of the lighting at the time of the shooting, and regarding suggestions that they got together and discussed identifying defendant as the shooter before they picked his photograph out of the lineup. Counsel argued extensively during closing argument that the eyewitness identifications were unreliable. In addition, the trial court instructed the jury with CALCRIM No. 315, which tells the jury to consider various factors when evaluating identification testimony, including the circumstances affecting the witnesses' ability to observe, the descriptions they gave of the shooter and how the descriptions compared to defendant, and the effects of stress and the passage of time between the event and the identification of defendant. In light of the foregoing and the strong identification and other testimony of the five eyewitnesses, and defendant's lack of an alibi defense, it is not reasonably probable that a different result would have occurred had the expert been permitted to testify. (*Sanders, supra,* at p. 510.)

Booking Information

Salinas Police Officer Kenneth Ellsworth testified on cross-examination at trial that on January 8, 2005, he received a " 'Be on the Lookout' " report for defendant which described defendant as five feet nine inches tall and 220 pounds. Ellsworth testified that the description came from defendant's last police contact as recorded in "an in-house records system where we keep track of arrests and contacts with various people, whether it be from traffic accidents or homicide arrests." Sergeant Sheldon Bryan testified on cross-examination that he listed defendant's height and weight as five feet nine inches tall

and 220 pounds on the pre-booking sheet he completed for defendant the night of January 8, 2005, following defendant's arrest, and that it "appear[ed] to be accurate." As stated above, the court granted the prosecutor's request to admit defendant's January 8, 2005 booking form into evidence when defendant did not object to its admission.

On redirect examination, the prosecutor asked Sergeant Bryan what defendant's height was on June 12, 2004. Defendant objected on hearsay grounds. The court sustained the objection while also noting a lack of foundation. Sergeant Bryan then testified that law enforcement agencies in Monterey County have booking stations with computer terminals and cameras where information such as an arrestee's height and weight are entered and correlated with the booking photographs. Sergeant Bryan identified a Monterey County pre-booking form for defendant dated June 12, 2004, stating it was identical to the form he filled out on January 8, 2005, "that's used in the regular course of business for the Salinas Police Department in booking inmates into the jail." Sergeant Bryan testified that the June 12, 2004 form would have been completed when defendant was booked into the county jail. "[T]hese forms are what the jail staff fill out. The jail staff are what provides us with these forms so that we can get it all done before we get them to the jail. So once the person has been arrested, we transport them to the police department, process them, get their photographs and then complete this form, and then we transport to the jail and turn this form [in to] the jail to them." Sergeant Bryan then testified that the June 12, 2004 form listed defendant's height and weight as five feet nine inches tall and 180 pounds. Defendant objected on the grounds of lack of foundation and lack of personal knowledge as to how the form was filled out, but the court overruled the objection.

Defendant now contends that his height and weight as listed in the June 12, 2004 form was inadmissible hearsay, and that "the prosecution failed to establish a proper foundation with someone with personal knowledge of how the document was prepared." "While [Sergeant] Bryan testified that the booking information was prepared by a public

employee in the course of public employment, he did not testify it was prepared at the time of the booking; thus the requirement of [Evidence Code section 1280,] subdivision (b) was not met. [Officer] Ellsworth said the information was derived from other sources, perhaps previous booking forms, driver's licenses, and the like. This being the case, there was insufficient evidence of the information being 'made at or near the time of the act, condition, or event.' "

Evidence Code section 1280 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." "A trial court has broad discretion in determining whether a party has established these foundational requirements. [Citation.] Its ruling on admissibility 'implies whatever finding of fact is prerequisite thereto; a separate or formal finding is, with exceptions not applicable here, unnecessary. (Evid. Code, § 402, subd. (c).)' [Citation.] A reviewing court may overturn the trial court's exercise of discretion ' "only upon a clear showing of abuse." ' [Citations.]" (*People v. Martinez* (2000) 22 Cal.4th 106, 120.)

In this case, we find that the trial court did not abuse its discretion in admitting testimony on the contents of defendant's June 12, 2004 pre-booking form. The court could have found that Sergeant Bryan's testimony satisfied the foundational requirements of Evidence Code section 1280 as to the form. Sergeant Bryan's testimony established that the form was completed by the county jail staff as part of their duties at the time defendant was booked into county jail, and that defendant was present and his photograph was taken at the time the form was completed. Thus, the method and time of the preparation of the form, along with its sources of information, were such as to indicate its

trustworthiness. However, even if we were to find that the court abused its discretion in admitting the testimony on the contents of the June 12, 2004 form, we would not find the error prejudicial. Defendant did not object to admission of the information on his January 8, 2005 form; his height was listed as five feet nine inches on both the June 12, 2004, and the January 8, 2005 forms; and the information on neither form could be used to conclusively establish defendant's weight on the night of the shooting incident, which was more than two months after the date of the first form and more than four months before the date of the second. Defendant has not established prejudicial evidentiary error.

The Gun and the Jailhouse Telephone Conversations

Defendant moved to exclude evidence of the gun found in his bedroom and of the jailhouse telephone conversations he had with his father and his brother about the gun. The prosecutor contended that the evidence of the gun was relevant gang evidence and that defendant's statements, when coupled with the evidence of the gun, were admissible as showing consciousness of guilt. The court denied defendant's motion to exclude the evidence, stating, "[T]he weapon, combined with th[e] conversations between [defendant] and his brother, I think a reasonable inference that the trier of fact can draw from that is that these guns – or that gun will be clean; the inference, I guess, and the argument, then, I think a reasonable inference the trier of fact could draw, depending on the evidence, is that this gun will be clean, another one wouldn't. So the .9 millimeter, the motion to suppress any evidence regarding the presence of the .9 millimeter weapon and that being seized, is denied. The statements – transcripts and statements, the phone calls between [defendant] and his father, the prosecution will be allowed to present that; and also to his brother, will be allowed to present that to the jury as well."

Parts of recordings of the jailhouse telephone conversations were played for the jury, and transcripts with English translations were provided. In the call from defendant to his father on the morning of January 9, 2005, defendant said that he was stopped outside his house because the police had a warrant for his arrest. He saw that the police

were at his house and did not want to pull into his driveway, so he pulled into another driveway. He said that he knew that the police found the gun that he got for protection after he had been shot at. His father asked him if he had bought the gun but defendant refused to say. His father asked if he had shot anybody. Defendant replied, "no, nobody, no." "It's . . . is . . . not with those. It's going to come out clean but it says here that they gave me another charge of, a murder charge and . . . [¶] . . . [¶] And four attempted homicides and um street terrorism. And I told him that he's wrong . . . ."

In the January 26, 2005 telephone conversation, defendant's brother asked him if the gun they found was "clean." Defendant responded, "From what I know, yeah." Defendant's brother said that if it is clean, defendant could be charged with having the gun "but they can't get you for that dude." Defendant responded, "They charged me, they charged me for a gun, three months that I'll be in here, that's already first on my first (inaudible)." Defendant said that a detective had told him that the evidence showed that he was at a party, some people passed by, and that he went over to where the people were and shot at them.

Defendant also moved pursuant to Evidence Code section 352 to exclude evidence of a jailhouse telephone call that defendant made to Becky Diaz on January 31, 2005, where Diaz arranged a three-way call with Joel M., an alleged active Norteño gang member, so that defendant could talk to Joel. The prosecutor argued that the conversation showed that defendant was associating with Norteño gang members while he was in jail. The court ruled that the recording of the call could not be played for the jury, but that Officer McKinley, the gang expert, could review the transcript of the call and testify generally about it and its significance "without getting into any of the specifics." McKinley testified at trial that defendant called Diaz and had her place a three-way call to Joel, and that defendant then told Joel that they found a gun when they searched his home after his arrest. McKinley testified that the transcript of the call indicates that defendant said, " 'I know they found the gun and they also found me.' "

Defendant acknowledges that the court instructed the jury on adoptive admissions (CALCRIM No. 357), and evidence of defendant's statements (CALCRIM No. 358). Defendant contends, however, that the evidence of the gun found in his bedroom and the jailhouse telephone conversations was irrelevant and unduly prejudicial. As the seized gun was not used in the charged offenses, "[w]hat little probative value it might have had was well outweighed by its dramatic effect. The evidence did not become admissible because of the jailhouse calls. Admission of the evidence violated due process because it invited the jury to make the legally impermissible inference that he was guilty of the allegations due to his character for possessing weapons and for violence." "While there was great prejudice from admitting the gun, there was little or no probative value in admitting evidence of the jailhouse conversations, and the conversations themselves added to the prejudice."

"Only relevant evidence is admissible [citations], 'and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.]' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 337.) Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Prejudicial evidence means " 'evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues.' " (*People v. Bolin* (1998) 18 Cal.4th 297, 320; see also *People v. Harris* (1998) 60 Cal.App.4th 727, 737.) " 'In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Karis (*1988) 46 Cal.3d 612, 638.) "Painting a person faithfully is not, of itself, unfair." (*People v. Harris, supra*, 60 Cal.App.4th at p. 737.)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns

of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

"Simply stated, and as a general rule, if a party to a proceeding has made an out-of-court statement that is relevant and not excludable under Evidence Code section 352, the statement is admissible against that party declarant." (*People v. Castille* (2005) 129 Cal.App.4th 863, 875-876, fn. omitted (*Castille*); Evid. Code, § 1220.)[3] "Evidence Code section 1220 covers all *statements* of a party, whether or not they might be characterized as admissions. [Citations.]' [Citation.]" (*Castille, supra,* at p. 876.)

Evidence Code section 1221[4] "generally permits hearsay to be admitted against a party, when that party has adopted it or agreed that a statement, originally made by someone else is true. The statute contemplates either explicit acceptance of another's statement or acquiescence in its truth by silence, equivocal or evasive conduct." (*Castille, supra*, 129 Cal.App.4th at p. 876, fns. omitted.) " 'There are only two requirements for the introduction of adoptive admissions: "(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his *adoption* of, or his *belief* in, the

[3] Evidence Code section 1220 provides in part: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity . . . ."

[4] Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

truth of such hearsay statement." [Citation.]' [Citation.]" (*Ibid*.; see also *People v. Davis* (2005) 36 Cal.4th 510, 535.)

In this case, defendant's statements during his jailhouse conversations were admissible as long as they were relevant and not excludable under Evidence Code section 352. The prosecutor argued that the statements were relevant to show consciousness of guilt. Defendant's statements indicate that he knew that he had a gun in his bedroom, but that the gun would not connect him to the charged offenses. His statements could also be reasonably interpreted to indicate a consciousness of guilt of the charged offenses. Defendant told his father that the gun they found would be "clean," from which a jury could infer that the gun that would not be "clean" was not found. Defendant's brother told him that, as long as the seized gun tested "clean," defendant could not be charged with killing Raya, but defendant did not then deny killing Raya. Defendant told Joel that the police found his gun and they found him, from which a jury could infer an admission of guilt. The evidence of the seized gun, which also included evidence that it was not the gun involved in the shooting, placed all of defendant's statements into context. Defendant was not entitled to the exclusion of all this evidence just because it was damaging or placed him in a bad light. Accordingly, we cannot say that the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner when it denied defendant's request to exclude the evidence under Evidence Code section 352. (*People v. Davis*, *supra*, 36 Cal.4th at pp. 536-538.)

Ineffective Assistance of Counsel

Defendant contends that trial counsel rendered ineffective assistance by failing "to make proper objections." Defendant's contention is that, to the extent that trial counsel's claims "were not properly advanced" or were "insufficiently advanced," trial counsel's performance was deficient. As we stated previously, when a defendant raises a claim of ineffective assistance of counsel on appeal, he or she must demonstrate that it is reasonably probable that, but for counsel's unprofessional performance, the result of the

proceeding would have been different. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688.) As we have found no prejudicial error or abuse of discretion in the trial court's evidentiary rulings, defendant cannot demonstrate that he was prejudiced by any alleged deficient performance of counsel.

Cumulative Error

Defendant lastly contends that "[e]ven if no error individually prejudiced [him] their cumulative effect did because they all crippled [his] ability to defend himself on the key issue of identity. Information that would have shown someone else committed the crime was withheld. Evidence that would have shown he was not the one who committed the crime was excluded. Evidence that encouraged conviction without logically proving identity was admitted. With all of the errors benefitting the prosecution on the one issue in dispute, an issue that was a close call, the series of errors so undermined confidence in the verdict that reversal is necessary."

Our Supreme Court has recognized that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) We have found no prejudicial error or abuse of discretion in any of the trial court's evidentiary rulings, and no prejudice from counsel's alleged deficient performance. We also find that no cumulative prejudicial error has been shown.

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

I CONCUR:

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MIHARA, J.

McAdams, J.,

I concur in the judgment. I agree with the majority opinion in all respects with one critical exception. In my view, the court erred in excluding the expert testimony on eyewitness identification. However, I cannot conclude such error mandates reversal.

"[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion; . . .'we do not intend to "open the gates" to a flood of expert evidence on the subject.' [Citation.] We expect that such evidence will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter. Yet deference is not abdication. When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*People v. McDonald* (1984) 37 Cal.3d 351, 377 (*McDonald*), fn. omitted, overruled on other grounds as stated in *People v. Mendoza* (2000) 23 Cal.4th 896, 914-924; see also *People v. Sanders* (1995) 11 Cal.4th 475, 508-509 (*Sanders*).

In *People v. Jones* (2003) 30 Cal.4th 1084 (*Jones*), our Supreme Court reaffirmed *McDonald's* holding regarding expert testimony on eyewitness identification, noting that the holding in that case was not limited to cases in which there was "*no* other evidence whatever linking defendant to the crime." (*Jones, supra,* 30 Cal.4th at p. 1112.) The Court reiterated that "[e]xclusion of the expert testimony is justified *only if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability*. (*Ibid*., italics added.)

In this case, there can be no dispute that eyewitness identification of defendant was a key element of the prosecution's case and that defendant offered the qualified expert testimony of psychologist Dr. Steven E. Clark. The critical question thus becomes whether the "other evidence" in the case substantially corroborated the eyewitness identification and gave it independent reliability.

The trial court's ruling

After reviewing the written *in limine* motions presented by each side on the issue of the expert evidence, the trial court excluded Dr. Clark's testimony, citing eight factors: (1) the court found that "a number of witnesses can corroborate each other's identification"; (2) from a review of the transcripts from the first trial, the court did not believe that "the witnesses got together" and talked about their identifications before the lineups; (3) some witnesses had been shown lineups without defendant's picture; (4) the jury instruction on eyewitness testimony would be given: (5) memory fading over time was a matter of common knowledge; (6) there was no issue of cross-ethnic identification; (7) the "gang evidence";and (8) "comments" made by defendant.

Evidence other than the identification by eyewitnesses

Very little non-eyewitness identification evidence was introduced in the trial. As noted in the majority opinion, several witnesses said the shooter was wearing a white hooded sweatshirt and was seen walking down the street in the direction of an apartment complex. One witness saw defendant attending parties at this apartment complex during the summer of 2004. The gang expert identified defendant as an active Norteño gang member. An officer conducting a search of defendant's home found a pistol and a magazine and bullets, none of which was connected to the murder weapon. Defendant's sister told the officer that a 49ers sweatshirt with a hood found in her bedroom belonged to defendant. One officer described it as "gray" or "black." The "finding officer" testified that no plain white hooded sweatshirt was found in the entire house. In addition,

witness Jorge testified that when he drove by the apartments on the evening of the shooting, he saw a man in a white sweatshirt with a hood, but did not see his face. Jorge also saw a gray Honda Accord there. Shortly before the shooting, he saw the same car drive slowly by the address where the victim and the witnesses were located and observed that one of the occupants was wearing a white sweatshirt. He never told the police about the man at the apartments. The prosecution also presented taped jail conversations containing ambiguous statements defendant made to relatives, claiming they were admissions or statements showing consciousness of guilt.

The testimony of the five eyewitnesses as substantial corroboration

The heart of the prosecution's case was the identification of defendant made by the five eyewitnesses. With so little circumstantial evidence to connect defendant to the crime, the trial court essentially found that the eyewitness identifications by the five witnesses themselves provided the substantial corroboration and source of independent reliability mandated by *McDonald*.

It is my view that such multiple eyewitness identifications cannot serve as the "other evidence" contemplated by the Court in *McDonald*. The corroborating evidence must be something other than the very eyewitness identifications that are the subject of the proffered expert testimony.

The argument has been made that the trial court's exclusion finds support in the two multiple-eyewitness cases of *Jones* and *Sanders*, where exclusion of eyewitness expert testimony was affirmed by our Supreme Court. *Jones* indeed involved five witnesses who identified defendant and who corroborated the testimony of the restaurant worker eyewitness to the robbery and murder. However, the defendant was not a stranger to any of them. The five witnesses included two accomplices who were in the car during the robbery, a fellow gang member, a cellmate, and another acquaintance, all of whom also testified that the defendant made specific and graphic *admissions of the robbery and*

murder. (*Jones, supra*, 30 Cal.4th at pp. 1098-1100, 1112.) The multiple corroborating witnesses in *Sanders* included three witnesses who knew the defendant and who were approached by him and were told about the plans to rob the restaurant. Another witness was threatened by the defendant after testifying at the preliminary hearing. Physical evidence found in the defendant's apartment (weapons, live and spent shells, coins and bills) connected him to the robbery and murders. (*Sanders, supra*, 11 Cal.4th at pp. 508-510.)

Therefore I would find *McDonald* governs and the exclusion of the expert testimony was error.

Whether error justifies reversal

In determining the issue of prejudice justifying reversal, the California Supreme Court has held that the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 applies to the exclusion of the expert testimony under these circumstances.[1] Thus, exclusion is prejudicial only if it was "reasonably probable that a result more favorable to defendant would have been reached in the absence of this error." (*McDonald, supra*, 37 Cal.3d at p. 376; *Sanders, supra*, 11 Cal.4th at p. 510.)

I cannot conclude that a more favorable result would be reasonably probable here in the absence of error. Defendant was fully able to explore and challenge the testimony of the five witnesses, including their fleeting opportunity to observe, the stress and urgency of the event, the adequacy of the lighting, the issue of bias, their conflicting descriptions of the shooter initially and during later interviews, and, most importantly,

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[1] Defendant alludes, in passing, to the "deprivation of the constitutional right to present a defense." But, as in *Sanders*, no argument "under the Sixth or Fourteenth Amendments of the United States Constitution and article I, sections 7 and 15 of the California Constitution" was presented below. (*Sanders, supra,* 11 Cal.4th at p. 510, fn. 3.)

their admitted group discussions of *some* nature about the shooting and the shooter's seeming familiarity to one of them. Indeed, the heart of the defense case was based on a theory of "contamination." The recurring theme and focus of the defense was that the eyewitnesses, who counsel referred to in closing argument as "these five perjurers," sought out defendant's photograph in a high school yearbook, showed it to each other prior to the photographic lineups and conspired to deny that they had done so.

This differs greatly from the situation in *McDonald* where several of the eyewitnesses were uncertain in their courtroom identifications, one prosecution witness testified that the defendant was *not* the gunman, and the defense presented six alibi witnesses.

Here, the witnesses were emphatic in their identification of defendant during the independently conducted photographic lineups and thereafter. They unshakably and consistently denied having any prejudicial discussions prior to the lineups and no alibi defense was presented.

In my view, to find prejudice justifying reversal in this case, one would have to conclude that it would be reasonably probable that Dr. Clark's testimony would have lead the jurors to conclude that the five eyewitnesses had colluded and lied and that the identification testimony of all five should be rejected. I cannot so conclude.

Nevertheless, I would caution trial courts to scrutinize the state of the non-eyewitness evidence with the utmost care before excluding expert evidence bearing on eyewitness identification. As the Court noted in *McDonald*: "The United States Supreme Court has recognized that 'The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.' (*United States v. Wade* (1967) 388 U.S. 218, 228 . . . .) The court noted 'the high incidence of miscarriage of justice' caused by such mistaken identifications, and warned that 'the dangers for the suspect are particularly grave when the witness' opportunity for

observation was insubstantial, and thus his susceptibility to suggestion the greatest.' " (*McDonald, supra,* 37 Cal.3d at p. 363.)

The danger of jeopardizing a defendant's right to present a defense and the risk of a miscarriage of justice are genuine.

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McAdams, J.